*NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.*

**Goldens Foundry & Machine Company *and* Anthony D. Jones *and* Darwin L. Lipscomb.** Cases 10–CA–32913 and 10–CA–33376

November 28, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On March 22, 2002, Administrative Law Judge William N. Cates issued the attached bench decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the bench decision[1] and the record in light of the exceptions[2] and brief and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by threatening employee Anthony Jones and violated Section 8(a)(3) and (1) by discharging Jones. For the reasons stated by the judge, we find the unlawful threat. For the reasons stated below, we find that the Respondent unlawfully discharged Jones.

[1] Although the determination whether to issue a bench decision is within the trial judge's informed discretion, the Board has provided guidance concerning the kinds of cases in which a bench decision may be appropriate. The Division of Judges Bench Book, Sec. 12-620, states that "[T]he cases in which bench decisions are rendered should be only those that 'turn on a very straightforward credibility issue; cases involving one day [trials]; cases involving a well settled legal issue when there is no dispute [over] the facts; short single issue cases; or cases in which a party defaults by not appearing at the [trials] . . . [I]n more complex cases, including cases with lengthy records, [bench decisions] would likely not be appropriate.'" Proposed Board Guidelines on Bench Decisions, 59 Fed. Reg. 65, 942-65, 943 (Dec. 22, 1994), adopted as a final rule, 61 Fed. Reg. 6941 (1996), codified as 29 CFR § 102.35. Because this case was relatively complex, involved a number of issues, many witnesses, and significant dispute over the facts, it is not of the type that was envisioned to be handled through a bench decision.

[2] The judge found that the General Counsel failed to prove that the Respondent unilaterally changed its employees' clock-in time and thereby failed to bargain with the Union in violation of Sec. 8(a)(5). No party excepted to the judge's dismissal of this 8(a)(5) allegation.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Facts

During the week of February 5–9, 2001,[4] Jones, a probationary employee at the Respondent's iron forging plant in Columbus, Georgia, had been working the first shift to fill in for a coworker, Walter Cobb, who was off work because of illness. On Friday, February 9, Jones spoke with his supervisor, John Toland, about when Cobb would be returning to work. The judge credited Jones' testimony that Toland informed Jones that Cobb would be returning to work the following Monday, February 12, and instructed Jones to return to his regular second-shift schedule that day.

Jones came to work on Monday at approximately 2 p.m. to start the second shift, but found that Toland was angry with him for coming to work "late." They spoke alone in the spin casting area of the plant, and no one overheard their conversation. The judge credited Jones who testified that Toland "cussed" at him and told him to go home and return the next day at 5 a.m. for the start of the first shift. Jones did as he was told and left work early without finishing his shift that day.

Jones reported for work on Tuesday and first spoke with Union President Darwin Lipscomb and Union Vice President Kerry Hammond about the prior day's events. Lipscomb, Hammond, and Jones then met with Toland and another supervisor, Travis Wilson, to discuss the matter. An angry exchange ensued, during which Toland denied telling Jones to return to the second shift on Monday, and denied sending Jones home early on Monday. Crediting Jones, the judge found that Toland stated that he was going to push the matter to the fullest extent because Jones had involved the Union. The judge found, and we agree, that this threat by Toland violated Section 8(a)(1) of the Act.

After their meeting with Jones, Toland and Lipscomb separately contacted Judith Giddings, the Respondent's human resources manager. In a telephone call, Toland told Giddings that he had heard in a meeting that Jones had not worked his entire shift on Monday. Toland asked Giddings how long Jones had worked Monday. Lipscomb asked Giddings to set up a meeting to discuss Toland's treatment of Jones. Giddings set up a meeting for the following day, February 14.

The details of the February 14 meeting with Giddings are sketchy. Jones described what had occurred on February 12, explaining that he thought he was supposed to work the second shift that Monday. There is no evidence in the record to indicate what Toland said at the meeting. However, during the meeting, Giddings directed Will Frost, a supervisor, to come to the meeting so Giddings

[4] All dates hereinafter are 2001 unless otherwise indicated.

could "ask him if Toland had sent Jones home," and Frost responded that he did not know anything about it. At another point in the meeting, Giddings interrupted the discussion to hold a brief, private caucus with Toland and Wilson. According to Giddings' testimony, she and the supervisors talked about "whether or not Anthony [Jones] left work authorized or not on Monday." Following this caucus, Giddings informed Jones that he was suspended pending further investigation.[5] It is undisputed that no one at the meeting told Giddings about Toland's prior unlawful threat directed at Jones.

Giddings testified that Jones was terminated on Friday, February 16, for not being available for scheduled work hours and walking off the job. Giddings explained her reasons as follows:

> I made that decision because, two-fold, he [Jones] did not—well, we really hadn't decided to do anything until he walked off the job. We weren't going to take any action. He had walked off the job. It was determined that he had definitely walked off the job that afternoon. It also was determined that there could have been perhaps that he thought he was suppose[d] to change shifts. So, we were going to give him the benefit of the doubt that he thought he changed shifts that day. Then, when he walked off the job and we did determine that he didn't notify anybody that he was leaving that day, he just left and that that job was not complete that day, that that was the deciding factor to go ahead and terminate.

## Judge's Decision

The judge found that the General Counsel had established his initial burden of proof under *Wright Line*.[6] We agree with the judge that the General Counsel established protected activity by Jones, employer knowledge of Jones' protected activity, and the timing of Jones' discharge in relation to his protected activity. Jones engaged in protected activity by having the Union pursue a grievance against Toland; both Toland and Giddings knew about the Union's involvement in Jones' grievance, and the discharge of Jones occurred shortly thereafter.

Regarding the element of animus, the judge found that there was evidence of antiunion animus on the part of Toland based on the unlawful threat he made on February 13 regarding pushing the issue to the fullest extent because Jones had involved the Union. Significantly, however, the judge found that there was no evidence of antiunion animus on the part of Giddings, the decisionmaker, and that she made her decision to discharge Jones without knowledge of the illegal threat made by Toland.

After finding that Giddings had acted without animus, the judge reviewed whether the antiunion animus demonstrated by Toland should be imputed to the actions of the "innocent" decisionmaker Giddings. The judge found that after Jones involved the Union, Toland decided to push the issue further, and that he continued to pursue it to such an extent that it must be concluded that the matter would have never been brought to Giddings' attention were it not for Toland pushing it. Based on this conclusion, the judge imputed Toland's animus to Giddings and found the violation of the Act.

## Analysis

The Respondent contends that the judge erred in finding that the General Counsel met his initial burden of establishing that Jones' union activity was a motivating factor in his discharge. The Respondent argues: (1) there is no evidence of Toland "push[ing]" the matter for further disciplinary review and (2) any antiunion animus expressed by Toland should not be imputed to Giddings. We find no merit in either argument.

Although it was Lipscomb rather than Toland who contacted Giddings and arranged the February 14 meeting, Toland had already brought the matter to Giddings' attention during his February 13 telephone call. Implicit in Toland's statements to Giddings was not only that Jones had failed to obtain permission from Toland to leave his shift early on Monday, but also that Toland had been completely unaware that Jones had not worked his entire shift on Monday. This version of what transpired on Monday was false, as Toland had ordered Jones to go home when he arrived at the start of the second shift on Monday. As revealed by Giddings' testimony described above, the February 14 meeting focused on Toland's version.

It is well established that if a supervisor provides a false report that leads to a discharge, that supervisor's unlawful motivation is imputable to the employer, even if the official who actually makes the discharge determination is unaware of the supervisor's animus. See, e.g., *JMC Transport, Inc. v. NLRB*, 776 F.2d 612, 619 (6th Cir. 1985); *Springfield Air Center*, 311 NLRB 1151 (1993). See *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 117–118 (6th Cir. 1987); and *Boston Mutual Life Insurance Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982). In this case, Toland's unlawful motivation must be imputed to Giddings because were it not for the fact that Toland brought Jones' purported misconduct on February 12 to Giddings's attention, Jones would not

[5] The judge incorrectly states that Jones was suspended on February 13.

[6] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

have been discharged. Giddings' good-faith belief[7] in what Toland falsely told her does not insulate the Respondent from the consequences of its action in discharging Jones in reliance thereon. Thus, we agree that the General Counsel met his initial burden of proof of unlawful discharge under *Wright Line*.

We further agree that the Respondent failed to meet its *Wright Line* burden of establishing that it would have discharged Jones even absent his protected activity. Based on the credited evidence, Toland acted improperly and sent Jones home on February 12, and Toland had no intention of pursuing the matter after February 12. But, as found by the judge, Toland changed his mind the next day, when he was confronted by Jones' protected activity. In the meeting with Jones and the two union officials on February 13, Toland lied when he denied sending Jones home. Toland's lie—the "deciding factor" for Giddings' decision to fire Jones—arose and was maintained due to Jones' protected union activity. Thus, the Respondent failed to show that it would have discharged Jones absent his action in getting the Union involved. Accordingly, we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging Jones.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Goldens Foundry & Machine Company, Columbus, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. November 28, 2003

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[7] Without knowledge of Toland's unlawful threat to Jones, Giddings had no reason to question Toland's motive or credibility in this matter.

*Elaine Robinson-Fraction, Esq.,* for the Government.
*George G. Boyd Jr., Esq.,* for the Company.

## BENCH DECISION

### STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is an interference with employee rights, wrongful discharge, and unilateral change in employees' clock-in times case. At the close of a 2-day trial in Columbus, Georgia, on February 26, 2002, and after oral argument by Government and company counsel, I issued a Bench Decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations setting forth findings of fact and conclusions of law. This certification of that Bench Decision, along with the Order which appears below, triggers the time for filing an appeal (Exceptions) to the National Labor Relations Board (the Board).

For the reasons (including credibility determinations) stated by me on the record at the close of the trial, I found Goldens Foundry & Machine Company (the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act) on February 13, 2001, by threatening an employee with unspecified reprisals because of his union and other concerted protected activities. I also found the Company violated Section 8(a)(3) and (1) of the Act, when on February 13, 2001, it suspended and thereafter on February16, 2001, discharged and refused to reinstate its employee, Charging Party Anthony Jones (Charging Party Jones or Jones). I specifically found Jones's immediate supervisor told Jones he was advancing Jones's work situation through the administrative process that resulted in Jones's discharge because Jones sought assistance from the Glass, Molders, Pottery, Plastics & Allied Workers International Union, ALF–CIO, CLC (the Union). I concluded Jones' work situation would never have been brought to the Company's human resources department absent his supervisors unlawfully motivated reasons for advancing work situation to that department. I rejected the Company's defense that it lawfully discharged Jones, without recourse, as a probationary employee, pursuant to the parties collective-bargaining agreement. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

The credible evidence established, as the Company asserted, that it bargained to an agreement with the Union regarding time sensitive, clock-in procedures at the Company. The Company, for safety among other reasons, established a new card swipe turn-stile type clock-in system with one location at the facility entrance for all employees; whereas the previous system involved multiple clock-in stations in the various departments. The credited evidence established the parties, around early June 2001, negotiated an agreement that required employees to clock-in at the entrance turn-stile 3 minutes before their work shift started in order not to be considered tardy arriving at their specific department work stations. Even if I had not concluded the parties arrived at an agreement I would have concluded they were at impasse and the Company could have implemented its last offer which was the 3-minute clock-in rule. Accordingly, I dismissed the complaint allegation the Company on or about

June 1, 2001, unlawfully unilaterally changed employees' clock-in time.

I certify the accuracy of the portion of the transcript, as corrected,[1] pages 212 to 233, containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

### CONCLUSION OF LAW

The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above and that its violations have affected and, unless permanent enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

### REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Company having discriminatorily discharged its employee Anthony Jones I shall recommend he, within 14 days from the date of this Order, be offered full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority, or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings or other benefits suffered as a result of the discrimination against him with interest. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following[2]

### ORDER

The Company, Goldens Foundry & Machine Company, Columbus, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in union or concerted protected activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such union or concerted protected activities.

(b) Threatening employees with unspecified reprisals for engaging in union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the date of this Order offer Anthony Jones reinstatement to his former position or if his former position no longer exists to a substantially equivalent position without prejudice to his seniority or other rights or privileges previously enjoyed.

(b) Within 14 days of this Order remove from its files any reference to his unlawful discharge and within 3 days thereafter notify Anthony Jones in writing this has been done and that his discharge will not be used against him in any manner.

(c) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at Columbus, Georgia facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 13, 2001.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 10 of the National Labor Relations Board sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

IT IS FURTHER ORDERED that the complaint be, and is, dismissed insofar as it alleges violations of the Act not specifically found.

Dated at Washington DC March 22, 2002

### APPENDIX A

This is my Decision in the matter of Goldens Foundry & Machine Company (herein Company), Case 10–CA–32913 and 10–CA–33376. First, I wish to take this opportunity to thank counsel for their presentation of the evidence. Both of you are a credit to the party you represent.

This is an unfair labor practice case prosecuted by the National Labor Relations Board's is (herein Board), General coun-

[1] I have corrected the transcript pages containing my Bench Decision and the corrections are as reflected in attached Appendix [C] [omitted from publication].

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sel (herein Government Counsel) acting through the Regional Director for Region Ten of the Board, following an investigation by Region Ten's is staff.

The Regional Director for Region Ten of the board issued an Order Consolidating Cases, Amended Consolidated complaint, and Notice of Hearing (herein Complaint) on January 16, 2002 based upon an unfair labor practice charge filed on February 20, 2001 by Anthony D. Jones, an individual (herein Jones or Charging Party Jones) in Case 10–CA–32913, and an unfair labor practice charge filed on October 25, 201, and amended on December 18, 2001, by Darwin L. Lipscomb, an individual (herein Lipscomb or Charging Party Lipscomb) in Case 10–CA–33376.

Certain facts herein are admitted, stipulated, or undisputed. It is essential that I set forth certain of those facts at this point in the Decision, which I now do.

It is admitted the Company is a Georgia corporation with an office and place of business in Columbus, Georgia, where it is engaged in the manufacture and fabrication of steel. During the twelve month period preceding the issuance of the Complaint herein, a representative period, the Company sold and shipped goods valued in excess of 50 thousand dollars directly to customers located outside the State of Georgia. The parties admit the evidence establishes, and I find the Company is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the National Labor Relations Act, as amended (herein Act).

The parties admit and I find Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL–CIO (herein Union) has been and is a labor organization within the meaning of Section 2(5) of the Act.

The parties admit and I find that Supervisor John Toland (Supervisor Toland), Supervisor Gilbert Bushman (Supervisor Bushman), and Human Resources Manager, Judith Giddings (Human Resources Manager Giddings) are supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act.

It is admitted that all employees employed by the Company at its Columbus, Georgia facility, excluding clerical employees, guards, and supervisors as defined in the Act constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

It is admitted that at all times material herein, the Union represented a majority of the employees in the unit I just described for the purposes of collective bargaining, and by virtue of Section 9(a) of the Act, has been and continues to be the exclusive bargaining representative of all employees in the unit for the purposes of collective bargaining.

It is admitted that at all times material herein the Company and the Union have been parties to successive Collective Bargaining Agreements, the most recent being effective from February 1, 2001 to January 31, 2006, encompassing, inter alia, rates of pay, wages, hours of employment, and other terms and conditions of employment of the employees in the unit I earlier described.

The specific Complaint allegations are that on or about February 13, 2001, the Company, by its Supervisor Toland, threatened its employees with the issuance of a written warning and unspecified reprisals for engaging in Union activities. It is alleged these actions of the Company violated Section 8(a)(1) of the Act.

It is also alleged that on or about February 13, 2001, the Company suspended and thereafter terminated its employee, Anthony D. Jones because he engaged in Union and concerted protected activities. It is also alleged these actions by the Company violated Section 8(a)(3) of the Act.

It is further alleged that on or about June 1, 2001, the Company unilaterally changed employees' clock in times. It is alleged these actions by the Company violate Section 8(a)(5) of the Act.

The Company denies having violated the Act in any manner alleged in the Complaint.

The time frame involved in this case essentially runs from February 5, 2001 until approximately February 16, 2001. That time frame encompasses the alleged wrongful discharge actions herein. Certain of the witnesses placed the dates differently within a day or so. I find that insignificant to the outcome of the case. Primarily, I'm concerned with a number of meetings that took place and the action of the individuals, the Union, and the Company with respect to those meetings.

Jones testified he commenced working for the Company as a probationary employee on or about October 3, 2000. Jones was laid off from the Company on or about November 17, 2000 and re-called on or about January 3, 2001. Jones initially started on the first shift, which works from approximately 6:00 a.m. until approximately 2:30 p.m. He later worked the second shift, from approximately 2:30 p.m. until approximately 10:30 p.m.

It is undisputed Jones' employment was terminated on or about February 16, 2001. Jones testified he was told his termination resulted from his (Jones) making his own schedule and walking off the job. Jones testified that in early February, he was assigned to fill in for an employee, Walter Cobb, on first shift, working from approximately 5:00 a.m. until 2:00 p.m. He stated he was asked to fill in on first shift from his regular second shift job for employee Cobb because employee Cobb had health concerns and was off from work. Jones worked a few days for Cobb, and according to Jones was told by Supervisor John Toland on Friday, February 9, 2001, that Cobb would be returning to work the following Monday, February 12, 2001. According to Jones, he was told to return to work on his regular second shift job starting at approximately 2:00 p.m. on that Monday.

Jones testified he told fellow employees, Terry Phillips and William Gosha, that he was to return to his regular job on Monday, February 12, 2001, inasmuch as Cobb was returning to work. Jones testified this conversation took place on Friday, February the 9th. Phillips' testimony supported Jones on this particular point.

Jones testified he reported for work on second shift on Monday, February 12, 2001, and Supervisor Frost had him performing gate knocking type work. According to Jones, Supervisor Toland spoke with him later that morning and cursed him out. They spoke alone in the spin casting area. Jones testified Toland was upset about his being at work at that time instead of on first shift that morning. Jones tried to explain why he was there, but Toland told Jones he didn't want to hear h is damn shit, to take his ass home, and be back the next morning at 5:00 a.m. Jones testified Supervisor Toland cursed him and send him home.

Jones testified he came to work the next day, Tuesday, February 13, 2001. Jones spoke at some point with Kerry Hammond, who advised him to speak with Union President, Darwin Lipscomb, about his being cursed by Supervisor Toland. Union President Lipscomb talked with Jones and called for a meeting with Supervisor Toland. Jones, Hammond, and Toland met, and at the meeting Lipscomb asked Toland if he had cursed Jones and sent him home. According to Jones, Toland denied cursing him or sending him home.

That same day, Tuesday, February 13, 2001, there was a meeting with Jones, Union President Lipscomb, Union Vice-President Hammond, Supervisor Toland, and Foundry Superintendent Wilson. According to Jones, there was a lot of screaming and yelling at this meeting, with Superintendent Wilson attempting to calm or quieten the group. According to Jones, Toland was upset, angry, and loud, and stated he was going to push the issue because Jones had gone to the Union for help.

Union Vice-President Hammond described the situation as Toland telling Jones and the others that he was only going to give a verbal warning to Jones, but because he had gone further he was going to pursue it because it had gotten to the Union, and as a result he was going to push it to the fullest extent possible.

Union President Lipscomb described it as Supervisor Toland telling them since Jones had gone to the Union, he was going to take him to Human Resources and get him terminated.

Jones testified Union President Lipscomb told Toland he couldn't threaten the man's job, that the decision was up to Human Resources Manager Judy Giddings. Lipscomb asked for, but was not provided, the work schedules for the day in question.

Jones returned to work that day and reported for work the next day at 5:00 a.m., which it appears was Wednesday, February 14, 2001. At about 10:00 a.m., Jones was asked to attend a meeting in Human Resources Manager Giddings' office. Those present at this meeting included Jones, Union President Lipscomb, Union Vice-President Hammond, Supervisor Toland, Foundry Superintendent Wilson, Human Resources Manager Giddings, and for at least part of the meeting, Supervisor Frost. Jones testified he explained what had happened the two previous days.

According to Union President Lipscomb, Human Resources Manager Giddings asked Jones why he had come in on the wrong shift. Lipscomb explained Jones told the group that Supervisor Toland told him the employee he had been working for would be back to work and he (Jones) was to go back to his regular second shift. Lipscomb also testified that Human Resources Manager Giddings said the Company had been having a lot of problems with Jones' work performance.

Jones testified there was again a lot of screaming and yelling, mostly by Toland and Union President Lipscomb, with Giddings, Wilson, and Frost remaining calm. Nothing was arrived at, and according to Jones the management persons excused themselves for a caucus and returned with Human Resources Manager Giddings announcing to Jones that he was suspended pending further investigation.

Jones testified no one mentioned at this meeting that Toland had allegedly stated earlier that he was going to push the matter all the way because of the Union.

Jones testified he was a good employee and had been so told by his supervisors.

Jones was spoken to by Human Resources Manager Giddings on February 16, 2001, and terminated for establishing his own schedule and for walking off the job.

Supervisor Toland testified he worked Jones on several different jobs in the department, including those of an iron pourer, a spin cast worker, and pushing the bull. According to Supervisor Toland employee Walter Cobb experienced chest pains on February 5, 2001 and went to the doctor. The doctor pulled Cobb from work for a series of tests. Toland transferred Jones to the first shift spin cast weight jacket cleaner type work. Toland testified he told Jones the transfer assignment would be in effect until further notice.

Toland testified that on Friday, February 9, 2001, Jones wanted to leave work early to cash an IRS refund check, but Toland had him work late until 3:30 or 4:00 p.m. that day. Toland denied telling Jones that Cobb would be returning to work the following Monday, February 12, 2001. Toland explained he simply did not know when Cobb might be returning to work.

On Monday, February 12, 2001, when Jones did not show up for work on the first shift, Toland testified he obtained a contact number from Human Resources for Jones and called that number. Toland testified he spoke with Jones's sister, who said Jones was out of town. Toland testified that toward the end of the day, at approximately 1:45 p.m., Jones approached him in a confrontational manner. A conversation ensued about changing work hours. Toland instructed that Jones come to work the next day at 5:00 a.m., but denied sending Jones home or of contemplating disciplining Jones because Jones was going to work eight hours, albeit later than previously scheduled.

Toland did not recall any specific curse words he might have used, but acknowledged he was—given to cursing, particularly when confronted, and acknowledged he may have cursed on the occasion in question. Toland explained that he didn't curse any more than he was cursed at.

Toland testified Cobb returned to work the next day, Tuesday, February 13, 2001. Toland testified that at about 7:30 to 8:00 a.m. on that day, Jones was not at the pouring deck, but rather was talking with Union President Lipscomb and Union Vice-President Hammond. According to Toland, Union President Lipscomb wanted a meeting about Toland's cursing of Jones. Toland agreed to the meeting, but brought Foundry Superintendent Wilson as a Company witness.

Toland testified it was at this meeting between he, Wilson, Jones, Lipscomb, and Hammond that he learned that Jones had left work the day before without finishing his shift. Toland testified this really upset him because Jones had not only established his own work schedule, but had left the Company without permission. Toland testified there was a meeting the next day, Wednesday, February 14, with Human Resources Manager Giddings, Union President Lipscomb, Vice-President Hammond, Jones, and Foundry Superintendent Wilson. Jones was suspended from work after the meeting.

Toland specifically denied sending Jones home on Monday, February 12, 2001, and more specifically denied telling Jones to take his damn ass home. On cross-examination, Toland

expressed more than once that he could not remember many of the specifics about the meetings involving Jones. Foundry Superintendent Wilson testified that to the best of his recollection, Toland did not mention the Union in his meeting with Jones, and the two Union officials that he was in attendance at.

Human Resources Manager Giddings testified she received a request from Union President Lipscomb to have a formal meeting regarding Jones on Wednesday, February 14, 2001. Giddings testified she, along with Toland and Wilson, attended for the Company, and that Jones, Lipscomb, Hammond attended for the Union. Giddings testified Jones explained he thought his shift had changed. Giddings testified there was no mention of the Union at this meeting. Giddings testified it was standard practice for the Union to be present at such meetings, even if the employees involved were probationary employees, specifically if they requested Union representation. Human Resources Manager Giddings said she made the decision to discharge Jones and did so because Jones had walked off the job and arranged his own schedule.

This case, as in most cases, requires credibility resolutions. In arriving at my credibility resolutions, I state that I carefully observed the witnesses as they testified, and I have utilized such in arriving at the facts herein. I have also considered each witness's testimony in relation to other witness's testimony and in light of the exhibits presented herein. If there's any evidence that might seem to contradict the credited facts I have set forth, I have not ignored such evidence, but rather have discredited or rejected it as not being reliable or trustworthy. I have considered the entire record in arriving at the facts herein.

In cases of this sort which turn on Employer motivation, or lack thereof, I am required to apply the principals set forth by the Board in its causation test which is outlined in *Wright Line*, 251 NLRB 1083 (1980) enfd. 662 F2n 899 (1st Circuit 1981), Cert. denied 455 US 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). The Board set forth its causation tests for cases alleging violations of the Act that turn, as does the case herein, on employer motivation.

First, the Government must persuade the Board that anti-union sentiment was a substantial or motivating factor in the challenged employer conduct or decision.

Once this is established, the burden then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. See *Manno Electric, Inc.,* 321 NLRB 278, fn. 12 (1996).

How does the Government establish its burden? Government counsel must demonstrate by preponderant evidence that the employee was engaged in protected activity, that the employer was aware of the activity, that the activity or the worker's union affiliation was a substantial or motivating reason for the employer's action, and there was a causal connection between the employer's animus and its discharge decision.

The Government may meet its *Wright Line* burden with evidence short of direct evidence of motivation. That is, inferential evidence arising from a variety of circumstances such as union animus, timing, or pretext, may sustain the Government's burden. Furthermore, it may be found that where an employer's proffered non-discriminatory motivational explanation is false, even in the absence of direct evidence of motivation, the trier of fact may infer unlawful motivation. *Sedek Dean Mining Corp. v. NLRB*, 362 Fed 2nd 466, at 470 (9th Cir. 1996), *Flour Daniel, Inc.*, 304 NLRB 970 (1991).

Motivation of union animus may be inferred from the record as a whole where an employer's proffered explanation is implausible or a combination of factors circumstantially support such inference. Direct evidence of union animus is not required to support such an inference.

Before applying the teachings of *Wright Line* to the facts of this case, it is necessary that I conclude what are the facts in this case.

I find there is no question or dispute that Jones worked at critical times herein, primarily on the second shift, and that due to a health situation involving employee Cobb, resulting in Cobb's absence from work, Jones was transferred to the first shift where he performed work for a few days. As I indicated earlier, the entire time frame moves from approximately February 4 or 5, 2001 when Cobb became ill until February 16, 2001, at which time Jones was terminated.

Jones testified that he was told on Friday, February the 9th, 2001, to return to his regular job on Monday, February the 12th, 2001. I credit Jones's testimony on that point for a number of reasons. First, Jones impressed me that he was telling the truth on this point. Secondly, Jones spoke with others about being told that he was to return to the second shift on that following Monday.

It also is interesting to note in resolving this credibility resolution that Mr. Cobb actually returned to work on Tuesday, February 13. I think that fact lends credence to Jones's testimony that he was told he was returning to work.

I, in crediting Jones, specifically do not credit Supervisor Toland's testimony that he did not tell Jones to return to work on that day because he had no idea when Cobb would be returning to work. I am persuaded that contrary to Toland's testimony, that he was kept fully informed on the status of Cobb's health and when he would be returning to work.

I am persuaded that Jones and Supervisor Toland, as well as Union Vice-President Hammond, are perhaps excitable people; that there was a vivid exchange, loud boisterous, yelling exchange in the meetings that took place between Supervisor Toland, Charging Party Jones, Union Vice-President Hammond, and also included Union President Lipscomb.

I am persuaded that in their vigorous exchange and in the heat of the moment that Supervisor Toland told Jones, as Jones testified, that he was going to push the matter to the fullest extent possible because Jones had brought in the Union.

I am persuaded that Toland thought the matter was behind them. I am fully persuaded that Toland cursed at Jones in the work place, telling him to, in essence, get his ass out of there and be back at work the next morning.

But, notwithstanding that, I am persuaded that Toland, when cooler heads prevailed, thought the matter was behind them. So, when he learned that it was not, when Jones came in with the two Union officials, I'm persuaded that this turned the heat back up again and that Toland made the comments attributed to him by Jones. Jones's testimony on that point is supported by the

testimony of Union President Lipscomb and Union Vice-President Hammond.

I am persuaded that the matter was further pursued and that it was brought to the attention of the Human Resources Manager Giddings. I am fully persuaded there was no mention of Union representation in the meeting with Giddings, that is the first meeting at which the Union President, Vice-President, and Jones were present for the Union, and that Giddings, Toland, and Wilson, and perhaps for a period of time, Frost, were present. I am persuaded that Human Resources Giddings made her determination to discharge Jones based on the facts before her without the knowledge of the Union accusations that Jones attributed to Toland, which I find were made. I find that Giddings looking into the matter, considered that Jones was not at his shift, and that he had left the job.

I also conclude that as a probationary employee, Giddings could discharge Jones without any reason—good, bad, or indifferent.

But where the Government moves the case forward is that I am fully persuaded that the case would never have gotten to Human Resources Manager Giddings' attention had it not been for Toland's pushing the issue. And I find Toland pushed the issue because Jones continued to pursue it and pursue it with the Union officials. It is for that reason that I am persuaded that the matter ever got to Giddings attention. I find that Giddings performed her job without the knowledge of that Union activity and that she took the action that she did based on the leaving and the ensuing mix-up of his not being on the job.

The fault, or the unlawful motivation for the discharge of Jones, rises from Toland. And it is Toland's sharp and focused reason for advancing the case that persuades me that the Government fully established a prima facia case of unlawful motivation in the discharge of Jones, and that the Company has not met its burden of demonstrating that it would have taken the same action even in the absence of the unlawful activity by Toland.

And I make that conclusion because, as I have repeatedly emphasized, the matter would never have gotten to Human Resources Manager Giddings were it not for the unlawful action of Toland.

I find that the Company must offer reinstatement to Jones, and make him whole for any loss of compensation he may have suffered as a result of the unlawful action involving him.

It is also alleged in the Complaint that the comment of Toland to Jones violates Section 8(a)(1) of the Act as a threat, and I'm persuaded that it does, and I am relying specifically on the account of Jones that Toland told him he was going to push the issue because Jones had gone to the Union for help.

I will order an appropriate Notice for the 8(a)(1) violation.

It is also alleged in the Complaint that on or about June 1, 2001 the Company unilaterally changed employees' clock-in time and that such activity on the part of the Company violated Section 8(a)(5) of the Act. It appears the Company, for a number of years, had a clock-in system that worked for each department in which you had a card clock-in situation arrangement. The Company changed to a turn-style type, one location clock-in type arrangement. Prior to that time, the parties had an understanding as to what time one would be required to clock-in in order to be at one's duty station timely. What the time limit was with the previous arrangement is perhaps not critical at all to this proceeding. But there was the establishment of the new turn-style type clock-in system, which it appears from the record may well be a card swipe type entry to the facility that records the time with a great degree of specificity.

So Human Resources Manager Giddings determined that there needed to be some sort of adjustment with respect to what the clock-in time would be. Union President Lipscomb also came to that same conclusion and asked that there be an evaluation to see what would be the proper time that an employee would have to be clocked in in order not to be docked time for failure to clock-in in a proper and timely manner.

A failure to clock-in on a proper and timely manner resulted in perhaps a 15 minute penalty. Also a number of occasions of clocking in incorrectly could result in multiplying itself into an absence and matters of that sort. So, it was important, both to the Company and the Union, that they arrive at some resolution of this clock-in time problem.

The record supports and I find that there was an informal meeting between Union President Lipscomb and Human Resources Manager Giddings in which they discussed what would be the proper time, and then there was a more formal meeting at which the Union's negotiating committee, as well as the Company's official representatives, were present at. The Union contends through Union President Lipscomb that the parties agreed to a two minute clock in time, and that the Company came back and wanted to renegotiate it to a five minute clock in time. Union President Lipscomb testified there was never at any time an agreement to a three minute clock in time.

The parties had their formal meeting, and according to the Human Resources Manager Giddings and two of the Company's management personnel that were there all indicate that there was an agreement at this meeting that there would be a three minute time established and the Company implemented that three minute program and operated under it for an extended period of time.

I am fully persuaded that the parties arrived, as testified to by Giddings and supported by Supervisor Jefferson and Department Manager Thomas, that at a three minute clock in time. I do that for a number of reasons. One, I believe Giddings testified truthfully on that matter. Secondly, it was implemented without protest for at least a two month period of time. That information, based on the credited testimony of Giddings, was disseminated to the employees at safety meetings at which at least one of the meetings Union President Lipscomb and Vice-President Hammond were present at.

So, I find there was no unilateral action on the part of the Company in changing the time as alleged in the Complaint, and I shall dismiss the Complaint in that respect.

Even if I did not conclude that there was an agreement, I would certainly find that the parties had reached impasse on the matter, because impasse occurs when there is no likelihood of further movement on the part of either party, and it appears there is no further grounds on which the parties are going to move. I would find they were truly at an impasse, and I base that on the testimony of Union President Lipscomb who candidly admitted that there was nothing further to be said by the parties on this issue.

So, I conclude that the parties did reach an accord on that, and that in making that conclusion I find that the Government has failed to sustain its burden of proof that there was a unilateral change in employees' clock in time on or about June 1, 2001. And I shall dismiss that allegation in the Complaint.

In approximately ten days, the Court Reporter will serve on me a copy of the transcript in this proceeding. I will review and make corrections on that part of the transcript that constitutes my Decision, if corrections are needed. I will then certify those pages of the transcript that constitute my Decision as my Decision, and I will attach to it a Notice that will need be posted. It is from that time of the certification of my Decision that the appeals period runs, or at least that's my understanding of the Board's Rules and Regulations. I invite you, however, to check the Board's Rules and Regulations for yourself and not rely on my understanding of them.

Again, let me state that it has been a pleasure being in Columbus, Georgia. It has been a pleasure meeting each of you. And with that, this trial is closed.

(Whereupon, the hearing was closed at 10:00 a.m.)

## APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge employees because they engage in union and/or concerted protected activities.

WE WILL NOT threaten our employees with unspecified reprisals because of their union and/or other concerted protected activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Anthony D. Jones full reinstatement to his former job or if his former job no longer exists to a substantially equivalent position without prejudice to his seniority or other rights or privileges previously enjoyed; and, WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge less any net interim earnings, plus interest.

WE WILL within 14 days from the date of this Order, remove from our files any reference to his unlawful discharge, and within 3 days thereafter, notify Anthony D. Jones in writing that this has been done and that his discharge will not be used against him in any way.

GOLDENS FOUNDRY & MACHINE COMPANY